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In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-1798

BEATRICE FOODS CO., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1–A29) is reported at 493 F. 2d 1259. The opinions of the district court (Pet. App. B1–B24, C1–C6) are reported at 344 F. Supp. 104 and 351 F. Supp. 969.

JURISDICTION

The judgment of the court of appeals was entered on March 8, 1974. The petition for a writ of certiorari was filed on May 31, 1974. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether a firm that violates a Federal Trade Commission order prohibiting acquisitions is subject, under the civil penalty provisions of the Clayton and Federal Trade Commission Acts (15 U.S.C. 21(*l*),

45(*l*)), to penalties for each day it continues to hold the unlawfully-acquired interest.

2. Whether an order barring Beatrice Foods Co. from acquiring any "interest in" another dairy firm was properly interpreted as prohibiting Beatrice from entering into a series of transactions with Maple Island Dairies, Inc., as a result of which Beatrice acquired Maple Island distributorship contracts, sales volume, good will, and the right to use Maple Island's labels in a particular territory.

3. Whether district courts had the power to grant equitable relief in civil penalty suits brought under Section 5(*l*) of the Federal Trade Commission Act (15 U.S.C. 45(*l*)) prior to the 1973 amendments of the Federal Trade Commission Act (87 Stat. 591) which expressly empower district courts to grant such relief.

4. Whether the court of appeals correctly held that Beatrice Foods Co. violated a consent order requiring Beatrice to divest certain stock by December 1968, where the stock was not divested until after November 15, 1969.

STATUTES INVOLVED

Section 11(*l*) of the Clayton Act (38 Stat. 734, as amended, 15 U.S.C. 21(*l*), and Section 5(*l*) of the Federal Trade Commission Act (38 Stat. 719, as amended, 15 U.S.C. 45(*l*), are set forth at Pet. 4–5.[1]

[1] After this case was submitted for decision in the court of appeals. Congress amended Section 5(*l*) of the Federal Trade Commission Act by increasing the amount of the maximum civil penalty for each violation from $5,000 to $10,000, and by expressly empowering district courts to grant equitable relief in civil penalty cases. P.L. 93–153, Section 408(c), 87 Stat. 591.

STATEMENT

1. THE COMMISSION PROCEEDINGS AND CONSENT ORDER

In 1956 the Federal Trade Commission issued an administrative complaint against petitioner Beatrice Foods Co. ("Beatrice"), challenging under Section 7 of the Clayton Act [2] and Section 5 of the Federal Trade Commission Act [3] a large number of acquisitions Beatrice had made in the dairy industry (App. 984–998; 67 F.T.C. 473–480).[4]

The hearing examiner issued his initial decision in 1964 (67 F.T.C. 481), ruling that five of the challenged acquisitions violated Section 7, and proposing that Beatrice (1) divest the five unlawfully acquired companies, and (2) cease and desist for ten years from "acquiring, directly or indirectly, * * * the whole or any part of the stock, share capital or assets" of any firm engaged in manufacturing or selling certain dairy products, without the Commission's prior approval (*id.* at 692–693, 695–696).

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[2] Section 7 of the Clayton Act (38 Stat. 731, as amended, 15 U.S.C. 18) provides in pertinent part:

"No corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another corporation engaged also in commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly."

[3] Section 5(a)(1) of the Federal Trade Commission Act (38 Stat. 719, as amended, 15 U.S.C. 45(a)(1)) declares unlawful "[u]nfair methods of competition in commerce, and unfair * * * acts or practices in commerce * * *."

[4] "App." refers to the Appendix in the court of appeals.

The Commission upheld the examiner's findings and conclusions (App. 999–1049; 67 F.T.C. 697) and issued an order requiring divestiture and prohibiting Beatrice for ten years "from acquiring, directly or indirectly, by any device, or through subsidiaries or otherwise, the whole or any part of the stock, share capital or assets" of any firm manufacturing, processing or selling specified dairy products, without prior Commission approval (Pet. App. E1–E4).[5]

Beatrice then petitioned for review of the order in the Court of Appeals for the Ninth Circuit. While the petition was pending Beatrice and the Commission's staff agreed to a modified order, which was issued in June 1967 (Pet. App. G6–G9).

The modified order required divestiture of "all [dairy] plants which are owned in whole or in part by Beatrice" at Morgantown, West Virginia and at several locations in the southwest, including Albuquerque, New Mexico.[6] Divestiture of the southwest properties was to be made to a single purchaser approved by the

[5] The Commission had issued similar complaints against three of Beatrice's competitors. These three proceedings, which together with the proceeding against Beatrice represented an effort by the Commission to remedy what it viewed as an "industry-wide" "problem of acquisitions in the dairy industry" (App. 1012; 67 F.T.C. 697, 705–706), were terminated by consent orders. The "non-acquisition" provisions in the three orders were identical, requiring each firm to "cease and desist from acquiring, directly or indirectly, the whole or any part of the stock, share capital or assets (other than products sold in the course of business) of any concern" manufacturing, processing or selling certain dairy products (App. 945, 946, 947).

[6] The properties to be divested under the modified order were different from those the Commission's previous order would have required Beatrice to divest (compare Pet. App. E1–E2 with Pet. App. G6–G7).

Commission, unless one year from the date of the order Beatrice could demonstrate that it could not find an acceptable single purchaser. In that case, the order provided, Beatrice could dispose of the properties to two or more purchasers approved by the Commission. All divestitures were to be accomplished by December 1968.

The order also prohibited Beatrice for a period of ten years "from acquiring, directly or indirectly, any interest in any firm" manufacturing, processing or distributing specified dairy products, without prior Commission approval.

2. THE COURT PROCEEDINGS

A. THE DISTRICT COURT PROCEEDING

In October 1970 the United States, pursuant to the Commission's recommendation, instituted this civil penalty action. The complaint (App. 6–10) alleged that Beatrice had violated the order (1) by acquiring without the Commission's prior approval an interest in Maple Island Dairies, Inc. ("Maple Island"), a firm engaged in the sale of dairy products; and (2) by failing to divest its stock interest in Valley Gold Dairies, in Albuquerque, New Mexico, within the time prescribed. The complaint sought separate penalties for each day of the violations and injunctive relief. The district court, concluding that Beatrice had "raised no issue of material fact necessitating a trial" (344 F. Supp. at 118, Pet. App. B24), granted the government's motion for summary judgment, imposed daily penalties, and ordered divestiture.

(1) *Beatrice's Transactions with Maple Island.*[7]— In the spring of 1968 Maple Island decided to dispose of the "northern division" of its business. The northern division consisted of four company-owned stores,[8] eleven company-owned distributorships and eleven independent distributors.

The company-owned distributorships were converted into independent distributorships. The new distributors purchased the assets used to operate the distributorships; Beatrice financed the sale in most cases. The new distributors also agreed to distribute Maple Island products exclusively, and executed a conditional sales contract, factor's lien and a note in favor of Maple Island. Beatrice, Maple Island and each new distributor then executed an agreement whereby Maple Island assigned the distributorship contract, conditional sales contract, factor's lien, and note to Beatrice.

The eleven independent distributors paid Maple Island for their 30-day trade accounts; some of these payments were financed by Beatrice.[9] Maple Island granted Beatrice a license to use Maple Island's labels in the northern division for five years. Beatrice began supplying the northern division distributors on September 1, 1968.

The district court held that these "transactions * * * constitute at least an indirect acquisition of an inter-

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[7] The facts are undisputed. They are fully recited in the opinions below. 344 F. Supp. at 108–110, Pet. App. B5–B9; 493 F. 2d at 1262–1263, Pet. App. A3–A4.

[8] The disposition of the four Maple Island stores is not involved in this case.

[9] Six of the eleven independent Maple Island distributors paid Maple Island with funds advanced by Beatrice, four paid with their own funds, and one was dropped from the arrangement.

est in violation of the order. It is at best disingenuous for Beatrice to contend that the particular 'aggregate of rights, powers, privileges and immunities' transferred was not an interest in the milk distribution firm of Maple Island" (344 F. Supp. at 112–113, Pet. App. B13).

The district court rejected Beatrice's argument that evidence of the negotiations preceding entry of the Commission order was admissible to determine its meaning. "The order is not ambiguous so as to allow admission of parol evidence of the pre-order negotiations," the court ruled, but "[e]ven assuming ambiguity in the word 'interest' *arguendo,*" the record of the proceedings before the Commission makes it "clear that the acquisition of the sales volume by Beatrice and the loss of Maple Island as a competitor is the kind of event the order was intended to prevent" (344 F. Supp. at 113, Pet. App. B14–B15).

(2) *Beatrice's failure to divest its interest in Valley Gold Dairies within the time prescribed in the order.*— In its answer to the complaint Beatrice "admit[ted] that it was required to divest itself of its interest in an Albuquerque Dairy Plant (Valley Gold Dairies) within eighteen months from the effective date of the modified order," *i.e.,* by December 7, 1968, "but * * * aver[red] that extensions of time had been requested by defendant and granted by the Federal Trade Commission to and including November 15, 1969" (App. 20). The district court noted that "[t]he earliest possible presentment [to the Commission] of a purchaser [of the Valley Gold stock] was, by any view of the facts, no earlier than * * * December 19, 1969" (344 F. Supp. at 118, Pet. App. B23).

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(3) *The imposition of penalties and equitable relief.*—The district court imposed civil penalties of $200 per day (a total of $156,400) for the unlawful acquisition and retention of the northern division from September 1, 1968 to October 23, 1970, the date the complaint was filed, and $200 per day (a total of $9,800) for the failure timely to divest the Valley Gold stock from November 15, 1969 to January 3, 1970, the date upon which divestiture was effected. (351 F. Supp. 969, Pet. App. C1–C6). The court "consider[ed] evidence of defendant's claimed good faith * * * against the government's contention of a wilful and deliberate violation of the Order" (351 F. Supp. at 970, Pet. App. C2). The court also ordered Beatrice to divest "all rights, titles, interests, assets and facilities" it had unlawfully acquired as a result of its transactions with Maple Island (351 F. Supp. at 972, Pet. App. C6).[10]

B. THE COURT OF APPEALS' DECISION

The court of appeals affirmed, on substantially the reasoning of the district court. It upheld the imposition of daily penalties for Beatrice's unlawful acquisition, expressly rejecting the Tenth Circuit's contrary ruling in *United States* v. *ITT Continental Baking Co.*, 485 F. 2d 16, certiorari granted, April 29, 1974, No. 73–1290 (493 F. 2d at 1269–1271, Pet. App. A18–A21).[11]

[10] The divestiture requirement has been stayed pending appeal (see 493 F. 2d at 1270, n. 15, Pet. App. A19, n. 15).

[11] The court of appeals held that notice from the Commission that a person is violating an order is not a pre-requisite to the imposition of civil penalties for the violation (493 F. 2d at 1265–1269, Pet. App. A8–A17). The petition does not seek review of this ruling.

ARGUMENT

The holding of the court of appeals that a firm which violates a non-acquisition order is subject, under the Clayton and Federal Trade Commission Acts (15 U.S.C. 21(*l*), 45(*l*), to daily penalties for each day it holds the unlawfully-acquired properties conflicts with *United States* v. *ITT Continental Baking Co.*, 485 F. 2d 16 (C.A. 10), certiorari granted, April 29, 1974, No. 73–1290. We suggest that the Court defer acting upon the present petition until it has decided that case.

The remaining questions presented were correctly decided below and raise no issue of general importance.[12]

1. Petitioner asks this Court to review the lower courts' construction of the non-acquisition clause.

(a) Petitioner argues that the courts below improperly read the order as prohibiting the acquisition of an interest (or assets) *of* a dairy firm in addition to "interests *in*" a dairy firm (Pet. 16–20). Petitioner contends that the order prohibits it from acquiring an ownership interest in a dairy firm, but permits the acquisition of a dairy firm's assets (Pet. 18).

The court of appeals properly rejected petitioner's argument as "disingenuous" (493 F. 2d at 1263, Pet. App. A6). A firm has an ownership interest in its assets, including plant, equipment, sales volume, and goodwill which may be transferred to others. The

[12] ITT Continental, in its brief in No. 73–1290 (pp. 2, 41–57), presents three issues for resolution by this Court in addition to the "continuing penalty" question: (1) whether Continental's agreements with three local bakeries constituted acquisitions prohibited by the order (brief, pp. 41–46); (2) whether ITT Continental is subject to civil penalties for the unlawful acquisitions as a "successor" to Continental for the period after the latter

district court correctly read the clause to prohibit the acquisition by Beatrice of a dairy firm's ownership interest in its own assets.

Contrary to petitioner's assertion (Pet. 19–20), the construction by the courts below of the order is not inconsistent with this Court's construction of the "meatpackers'" decree in *United States* v. *Armour & Co.*, 402 U.S. 673. The *Armour* case involved decree language and a type of transaction quite unlike the language and transaction in this case.

(b) The courts below correctly rejected petitioner's contention that oral negotiations preceding entry of the consent order are admissible to alter its "normal meaning." The district court thought the order "not ambiguous" (344 F. Supp. at 113, Pet. App. B14),

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corporation merged with ITT Continental (brief, pp. 46–52); and (3) whether daily penalties may be assessed for the period after the Commission learns that its order is being violated but does not provide notice to the party that it is violating the order (brief, pp. 52–57).

The latter two issues are not present in the instant case. There is no "successorship" issue here, and petitioner Beatrice does not seek review of the court of appeals' ruling that notice of a violation is not a pre-requisite to the imposition of daily penalties (see n. 11, *supra*).

As to the first issue referred to above, both cases involved the question whether certain transactions constituted acquisitions prohibited by a Commission non-acquisition order. But the transactions which were held in each case to constitute violations of the non-acquisition orders were factually dissimilar (compare 493 F. 2d at 1262–1263, Pet. App. A3–A5, with 485 F. 2d at 19–20), and the question whether the courts of appeals correctly ruled in each case that the transactions involved violated the non-acquisition orders is not a question warranting plenary review by this Court.

and the court of appeals thought the order "clear" (493 F. 2d at 1264, Pet. App. A7). It would be contrary to settled principles to permit oral negotiations, not incorporated in the order, to limit the scope of an order unambiguous as written.[13] See, *e.g.*, *United States* v. *Armour & Co.*, 402 U.S. 673; *Gila Valley Irrigation District* v. *United States*, 118 F. 2d 507, 510 (C.A. 9). Cf. *United States* v. *Schine*, 260 F. 2d 552, 557 (C.A. 2), certiorari denied, 358 U.S. 934.

There is no conflict between the lower court's ruling and the decisions relied upon by petitioner (Pet. 14).[14] Those cases concerned payments made in settlement of claims by the Office of Price Administration for overcharges in violation of the Emergency Price Control Act of 1942 (56 Stat. 23, as amended). The settlement negotiations were relevant there in determining whether the overcharges were unintentional and deductible as ordinary and necessary business expenses under the Internal Revenue Code and non-deductible. None of those cases involved the construction of injunctive provisions in a consent order or decree.

(c) Petitioner's contention that "post-order" conduct by the Commission and members of its staff was

[13] Contrast the situation where parties to a consent order enter into a contemporaneous written agreement illuminating their purpose in agreeing to the order. See Brief for the United States in *United States* v. *ITT Continental Baking Co.*, No. 73-1290, p. 17.

[14] *United States* v. *Star-Kist Foods, Inc.*, 240 F. 2d 759 (C.A. 9); *American Brewery, Inc.* v. *United States*, 223 F. 2d 43 (C.A. 4); *Commissioner* v. *Pacific Mills*, 207 F. 2d 177 (C.A. 1); *Milton S. Kronheim & Co.* v. *United States*, 163 F. Supp 620 (Ct. Cl.).

inconsistent with the interpretation now urged by the government and adopted by both courts below is unsupported by the record.[15] Contrary to petitioner's argument, the decision below is not inconsistent with *United States* v. *Atlantic Refining Co.*, 360 U.S. 19. In *Atlantic Refining* this Court rejected as "strained" and irreconcilable "with the consistent reading given to the decree" by both parties for 16 years from the date it was entered the government's more recent construction of a decree. 360 U.S. at 22. In the instant case, neither the Commission nor its staff construed the order to condone an acquisition of the sort petitioner made.

(d) The government was entitled to summary judgment because all of petitioner's actions are, as the district court stated, "undisputed" (344 F. Supp. at 108, Pet. App. B5), and they presented no genuine issue of material fact necessitating a trial. Petitioner's reliance on *United States* v. *J. B. Williams Co., Inc.*,

[15] To the contrary, the post-order evidence demonstrates that the Commission staff interpreted the decree to prohibit this type of transaction. Petitioner acknowledges (Pet. 11, 12) that letters to petitioner (App. 1390) and National Dairy Products Co. (App. 1388–1389) demonstrate that the Commission thought the order at least as broad as the National Dairy decree, which prohibits acquisition of "any part of the stock, share capital or assets" of specified dairy firms. Petitioner's own counsel prepared a memorandum of the conversation with the Commission's staff, referred to at Pet. 12–13, which recites (App. 909, emphasis added): "Mr. Gercke [Chief of the Commission's Compliance Division] agreed that * * * I might have a point that the Beatrice Order was not as broad [as the orders against the other dairy companies] *and perhaps did not apply to minor equipment purchases, so long as Beatrice was not acquiring any of the business or good will of the seller.*"

498 F.2d 414 (C.A. 2), is misplaced. In that case the court held that summary judgment was improper because television commercials that allegedly violated a Commission order were susceptible of different understandings, only some of which were deceptive within the prohibition of the order. Here, however, petitioner's transactions with Maple Island were susceptible of no inference other than that petitioner acquired valuable interests or assets from Maple Island. To the extent petitioner implies (Pet. 14–16) that *J. B. Williams* holds that the construction of the order itself requires a trial, that suggestion is incorrect. "[D]etermining what the order means [is] concededly a task for the court * * *." 498 F.2d at 430–431.

2. The court of appeals correctly held that district courts have the inherent power to grant equitable relief (specific performance of the prohibition) in civil penalty actions. The contrary dictum in *Herbold Laboratory, Inc.* v. *United States,* 413 F.2d 342 (C.A. 9), is not persuasive. In any case the issue is not of continuing importance. Congress, in the 1973 amendments of the Federal Trade Commission Act, expressly authorized district courts to grant such relief. (See n. 1, *supra.*) There is no need for this Court to consider whether district courts had this power prior to the 1973 amendments because affirmance of the divestiture order would now be appropriate under the principle that changes in existing law are normally given effect in pending cases absent a clearly stated legislative direction to the contrary. *Bradley* v.

School Board of City of Richmond, No. 72–1322, decided May 15, 1974.[16]

3. Finally, petitioner contends (Pet. 4, 21–22) that the failure of its initial efforts to comply with the divestiture provisions of the order entitled it to additional time to divest its stock interest in Valley Gold Dairies. The court of appeals thoroughly considered and rejected this contention (493 F.2d at 1273–1275, Pet. App. A25–A29):

> Beatrice had notice from the date of the order that it had eighteen months in which to divest all five properties. [The eighteen months expired in December 1968.] As discussed earlier, the FTC's approval of the sale of the four properties did not terminate Beatrice's obligation to sell the Valley Gold Stock. The divestiture order is clearly divided into two parts: (1) a one-year period in which Beatrice was to attempt to sell all five properties to a single purchaser, and (2) an additional six months in which Beatrice could complete the divestitures by sales to separate purchasers, if need be. Thus, the old [sic] order did not become "inoperative" when the first sale was approved; rather it simply progressed to the second stage. [493 F.2d at 1275, Pet. App. A28.]

Moreover, despite petitioner's failure to divest the Valley Gold stock within the time prescribed in the order, the Commission subsequently advised petitioner

[16] Petitioner also contends that the district court erred in ordering divestiture because "no such penalty was provided for in the Commission's modified order" (Pet. 20). Divestiture, however, is not a penalty, but an equitable remedy to correct the violations.

that it would take no action if petitioner complied by November 15, 1969. Petitioner failed to comply by that date, and the district court imposed civil penalties only for retention thereafter (493 F.2d at 1274, Pet. App. A26–A27).

CONCLUSION

For the foregoing reasons it is respectfully submitted that the petition for a writ of certiorari should be denied as to all questions except question 1. The Court should defer further consideration of the petition and dispose of the case as appropriate in light of its decision in *United States* v. *ITT Continental Baking. Co.*, No. 73–1290, certiorari granted, April 29, 1974.

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